

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Philip G. Reinhard	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	95 CR 50024 - 3	DATE	9/9/2003
CASE TITLE	USA vs. Melton		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

Defendant's petition for writ of audita querela.

DOCKET ENTRY:

- (1) ☐ Filed motion of [use listing in "Motion" box above.]
- (2) ☐ Brief in support of motion due ____.
- (3) ☐ Answer brief to motion due _____. Reply to answer brief due _____.
- (4) ☐ Ruling/Hearing on _____ set for _____ at _____.
- (5) ☐ Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
- (6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
- (7) ☐ Trial[set for/re-set for] on _____ at _____.
- (8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.
- (9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
☐ FRCP4(m) ☐ General Rule 21 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).
- (10) ☒ [Other docket entry] For the reasons stated on the reverse of the memorandum opinion and order, the court denies defendant's petition for writ of audita querela.

- (11) ☒ [For further detail see order on the reverse side of the original minute order.]

<input type="checkbox"/> No notices required, advised in open court. <input type="checkbox"/> No notices required. <input checked="" type="checkbox"/> Notices mailed by judge's staff. <input type="checkbox"/> Notified counsel by telephone. <input type="checkbox"/> Docketing to mail notices. <input type="checkbox"/> Mail AO 450 form. <input type="checkbox"/> Copy to judge/magistrate judge.	/LC courtroom deputy's initials	U.S. DISTRICT COURT CLERK 03 SEP 10 PM 3:16 FILED-WD	number of notices	Document Number 107
			SEP 11 2003 date docketed	
			<i>[Signature]</i> docketing deputy initials	
			9-10-03 date mailed notice	
			<i>SW</i> mailing deputy initials	
		Date/time received in central Clerk's Office		

MEMORANDUM OPINION AND ORDER

Defendant, Timothy Melton, filed a petition for a writ of audita querela, seeking to challenge his sentence based on his trial counsel's alleged ineffectiveness in failing to inform him of this court's discretion to reject the government's offer pursuant to Fed. R. Crim. P. 11(e)(1)(C). The government has filed a response, and defendant has replied.

While the Seventh Circuit has suggested that a writ of audita querela might be available in a criminal case to "plug a gap in the system of federal postconviction remedies," it is doubtful such a gap exists given the availability of 28 U.S.C. § 2255 to in-custody defendants and the writ of coram nobis to those no longer in custody. U.S. v. Johnson, 962 F. 2d 579, 583 (7th. Cir. 1992); U.S. v. Kimberlin, 675 F. 2d 866, 869 (7th. Cir. 1982). Additionally, a writ of audita querela cannot be used to enable a defendant to file a section 2255 motion without complying with the rules governing such motions. Kimberlin, 675 F. 2d at 869.

In the present case, defendant seeks to challenge his sentence while he remains in custody. Thus, his only potential avenue or relief is section 2255. The court finds no authority that would allow an in-custody defendant to utilize the writ of audita querela because the defendant chooses not to pursue a remedy under section 2255 or is otherwise prohibited from pursuing relief under that provision. The writ of audita querela cannot be used for the sole purpose of circumventing orderly procedure. Kimberlin, 675 F. 2d at 869. Therefore, the court denies defendant's petition for writ of audita querela without reaching the merits of the petition.